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ILLINOIS COMMERCE COMMISSION

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|   |   |           |
|---|---|-----------|
| Illinois Bell Telephone Company                   | ) | On Remand |
|   | ) | 98-0252   |
| Application for Review of Alternative             | ) |           |
| Regulation Plan                                   | ) | (consol.) |
|   | ) |           |
| Illinois Bell Telephone Company                   | ) |           |
|   | ) | 98-0335   |
| Petition to Rebalance Illinois Bell Telephone     | ) |           |
| Company's   | ) | (consol.) |
| Carrier Access and Network Access Line Rates)     | ) |           |
|   | ) |           |
| Citizens Utility Board and the People             | ) |           |
| of the State of Illinois                          | ) |           |
| vs.   | ) | 00-0764   |
| Illinois Bell Telephone Co.,                      | ) |           |
| d/b/a Ameritech, Illinois                         | ) | (consol.) |
|   | ) |           |
| Petition for reduction in rates and other relief. | ) |           |

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ILLINOIS  
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**GOVERNMENT AND CONSUMER INTERVENORS'  
PETITION FOR INTERLOCUTORY REVIEW OF  
THE ALJ'S FEBRUARY 23, 2005 RULING**

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STATE OF ILLINOIS  
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**GOVERNMENT AND CONSUMER INTERVENORS'  
PETITION FOR INTERLOCUTORY REVIEW OF  
THE ALJ'S FEBRUARY 23, 2005 RULING**

The People of the State of Illinois, by Lisa Madigan, Attorney General; the City of Chicago, by Mara Georges, Corporation Counsel; and the Citizens Utility Board (Government and Consumer Intervenor - GCI), hereby file their Petition for Interlocutory Review of the Administrative Law Judge's February 23, 2005 Ruling ("ALJ Ruling"). As discussed below, GCI urge the Commission to reverse the ALJ Ruling. That ruling would eliminate the infrastructure investment requirement adopted by the Commission in its last Alt Reg Order without considering existing record evidence to determine the appropriate size of the requirement, or reopening the record for new evidence on the issue. The ALJ Ruling would remove from the Commission all discretion on remand and would unnecessarily relinquish the Commission's authority to

insure that Illinois Bell Telephone Co. ("IBT") continues to invest in Illinois infrastructure for the benefit of the State of Illinois and Illinois consumers. This would be particularly egregious in light of the Company's acceptance of the investment requirement in testimony and briefs, and the Commission's own insistence that the investment requirement be continued.

The ALJ Ruling denied GCI's request that the Commission enter an Order on Remand identifying the record evidence that supports the continuation of the \$600 million annual investment requirement through the next alternative regulation review, or in the alternative, that the Commission take additional evidence and conduct hearings to determine a new, specific dollar investment requirement for the Company. In support of this Petition, GCI state as follows:

## **I. INTRODUCTION**

### **A. The Commission's 2002 Alternative Regulation Review Order Adopted an Infrastructure Investment Requirement Explicitly to Address the Statutory Requirement that the Plan be in the Public Interest.**

On December 30, 2002, the Commission completed its review of the Illinois Bell Telephone Company (d/b/a SBC Illinois) Alternative Regulation Plan. That review, which was initiated in 1998, had been delayed due to SBC's purchase of Ameritech and IBT in 1998 and the proceedings associated with that purchase. See SBC Merger Docket, ICC Docket 98-0555. The Commission included the following investment language in the order approving SBC's purchase of Ameritech:

Network Infrastructure Investment - AI shall renew and extend the five-year network infrastructure modernization program previously established in its Alt. Reg. Plan. The investment shall total at least \$3 billion subject to adjustment in the Commission's subsequent review of the Alt. Reg. Plan. The five-year extension shall commence in the year 2000 or in the first calendar year following

the merger closing date. AI will retain the flexibility to structure and apportion the total network investment over the five-year period.

ICC Docket 98-0555, Merger Order at 240 (Sept. 23, 1999). In the subsequent Alt Reg Review proceeding, the Company did not challenge the amount of the investment requirement or its continuation. See pages 14-19 below. In its Order, the Commission continued the investment requirement until the next review, finding that it was "an important safeguard" and insured that the Alt Reg Plan was in the public interest. ICC Docket 98-0252, Order at 192-193 (Dec. 30, 2002).

In its discussion of the investment requirement, the Commission made clear that it believed the investment requirement was necessary to comply with the provisions of section 13-506.1 of the Public Utilities Act. After referring to the "Network Infrastructure Investment" condition in the SBC/Ameritech Merger Order, the Commission stated:

The review proceeding referred to in the language above is now upon us. **To be sure, it is essential that the plan continue forward in a manner/form that will (i) continue to encourage innovation; (ii) ensure the broad dissemination of technical improvements that reaches all classes of ratepayers; (iii) maintain service quality; and ultimately, (iv) serve to enhance the economic development of the state.** These are all goals under subsection (b) that remain to be addressed, and which we perceive to share a certain commonality.

As we see it, innovation is spurred by ideas and money. Carrying technical improvements to all classes of customers is another cost-involved proposition. **Service quality decline is assisted, at least in part, by an inadequate or aging network. Here again, sufficient monies must be expended. The State of Illinois, as we previously found and as common sense dictates, is economically enhanced when modern, up-to-date technologies are in position to meet customer demands. This too, speaks of financial investments. Taken as a whole, keeping each of these goals viable requires continued investment on the part of the Company.**

This concept is not lost on Ameritech. In addition to reporting on past investment, evidence on record shows that AI has a modernization plan for the

future. AI witness Jacobs details a number of upgrades and describes key elements of the Company's network plans on a going forward basis. (AI Ex. 5.0). **AI witness Gebhardt also acknowledges that while the initial plan commitment expired in year 1999, the Merger Order expressly required the Company to renew and extend its investment subject only to this review. (AI Ex. 1.1 at 56)**

Recognizing the \$3.7 billion spent that AI spent on network infrastructure improvements since 1995, Ms. Terkeurst nevertheless believes that the work must continue. **According to Ms. Terkeurst, the \$3 billion investment specified under the Merger Order is the minimum investment required to support AI's own basic products and services and should be maintained. This is an important safeguard, she testifies, and necessary to ensure adequate and continuing investment in network infrastructure going forward.**

**We agree. In order to spur innovation, to have AI disseminate improvements to all classes, to ensure service quality is up to standard, and to encourage innovation, all of which will add to the economic health of the State, the Commission herewith maintains, for the plan and in these premises, the whole of the \$3 billion dollar investment requirement it set out in the Merger Order.** We note, however, that the five-year investment per our Merger Order commenced in year 2000 and will expire at the end of 2004. The Plan, we expect, will continue beyond that point. Hence, to ensure that there are no gaps in the plan that would interfere with these essential goals, AI is required to target \$1.8 billion of additional investment to cover years 2005, 2006, and 2007. In the event that our next Plan review is not completed by the end of year 2007, an annual investment of \$600 million, or portion thereof, is required up to the time of our entry of an order- either continuing or terminating the Plan. **We make clear that this amount is for the improvements to and maintenance of basic services, together with such new innovations and technical improvements as will benefit and are broadly disseminated to all classes of customers.**

In the reporting we require, AI will identify each investment, **outline the particular products and services that benefit from the investment, explain where and how the investment is made, and indicate whether and to what extent the investment is in the interest of all of the Company's customer classes. The reports shall be filed as part of the annual rate filings.**

**This is the last modification to the plan and, added to the whole, ensures that the public interest is satisfied in these premises.**

Order of December 30, 2002, at page 192—193, as amended on February 14, 2003 (bold added). The Commission considered all of the requirements and goals of alternative regulation in extending the investment requirement, and in the last paragraph expressly found that investment was necessary for the plan to satisfy the public interest.

After the entry of the Order, the Company filed an Application for Rehearing challenging the investment commitment. It appealed the Order, arguing that the Commission lacked authority to extend the “Merger” investment requirement and that there was insufficient evidence to support the required investment.

**B. The Appellate Court’s Decision Affirmed the Commission’s Power to Adopt an Investment Requirement, But Reversed and Remanded the Order for Insufficient Evidence on the Specific Dollar Amount of the Requirement.**

On appeal, IBT challenged the Commission’s authority to impose the investment requirement and argued that there was insufficient evidence in the record to support it, notwithstanding the fact that SBC witnesses had committed to a continuing investment requirement and had not challenged the amount of the investment requirement in direct or subsequent testimony. See Ameritech Illinois Ex. 3.0, Sch. 1, p. 7 (IBT’s Plan for Alternative Form of Regulation including the \$3 billion investment requirement).

In response to IBT’s arguments, the Court held that (1) the Commission has the authority to impose the investment requirement, but that (2) there was insufficient evidence to support the specific amount of the investment requirement. The case was reversed and remanded with instructions to enter an order consistent with the court’s opinion.

In rejecting IBT's argument that the Commission lacked the authority to adopt the investment requirement, the Court said that IBT "continues to ignore the independent statutory authority that the Commission has been granted by section 13-506.1 of the [Public Utilities] Act" to impose a capital spending requirement. Slip Op. at 16, 352 Ill.App.3d at 641. The Court recognized that the investment requirement addressed several aspects of the alternative regulation statute, including authorizing a network modernization plan, facilitating the broad dissemination of technical improvements to all classes of ratepayers, and requiring that the plan will maintain the quality and availability of telecommunications services. Slip op. at 17, 352 Ill.App.3d at 641, citing 220 ILCS 5/13-506.1(a), 13-506.1(a)(4) and 13-506.1(b)(6). The Court concluded: "We find that the capital spending requirement the Commission included in the Alt Reg Plan is a network modernization plan aimed at these concerns. It was a decision taken within the authority granted to the Commission by the Act." Slip op. at 17, 352 Ill.App.3d at 641.

In addressing the specific investment requirement adopted by the Commission, the Court first found that there was evidence to support the need for the investment requirement, including the finding that service quality failures were the result of insufficient network investment. Slip op. at 18, 352 Ill.App.3d at 642. However, the Court reversed the specific dollar amount for lack of sufficient evidence, stating that the Commission "did not hear any evidence as to how this specific level of funding or any level of funding, for that matter, was the appropriate amount going forward or how this amount would achieve the statutory goals for alternative regulation." Slip op. at 18, 352 Ill.App.3d at 642.



The Court reversed “the Commission’s decision to include a \$600 million per-year capital spending obligation in the modified Alt Reg Plan” but otherwise affirmed the Order. The Court said: “If the Commission is going to impose multiyear, multibillion dollar spending obligations, we would expect evidence justifying that decision. Even under the deferential standard of review on such issues, *this specific* capital spending requirement must be reversed.” Slip Op. at 19, 352 Ill.App.3d at 642 (emphasis added). It remanded the Order to the Commission “with directions to enter an order consistent with this opinion.” Id.

**C. The ALJ Ruling On the Scope of Remand Would Unreasonably and Unnecessarily Restrict the Commission’s Power on Remand.**

On February 23, 2005, the ALJ issued a ruling that held that, “as a matter of compliance with the mandate of the reviewing court,” the Commission lacks the authority to conduct hearings on remand. ALJ Ruling at 24. The ruling also states that the Commission lacks the authority to revisit the existing evidence in order to identify the record evidence that supports the continuation of the \$3 billion investment requirement and cannot reopen the record to consider additional evidence. Id. at 25. The ALJ Ruling, if adopted by the Commission, would erroneously restrict the Commission’s authority on remand (1) by ignoring key portions of the Court’s decision, (2) by misinterpreting the relevant caselaw, and (3) by erroneously stating the bases of the investment requirement to be solely service quality problems, when in fact the investment requirement was based on several aspects of the alternative regulation statute, as indicated above.

**II. THE ALJ RULING INCORRECTLY SUGGESTS THAT THE APPELLATE COURT REQUIRED THE COMMISSION TO EXCISE THE INVESTMENT REQUIREMENT.**

The ALJ Ruling concludes that the Commission's "sole task on this remand is to prepare and enter an amendatory order that reflects the reversal of the spending requirement that was set out in the Alt Reg Review Order for this docket." ALJ Ruling at 26-27. This conclusion is not mandated by the Court and improperly limits the Commission's options on remand.

In City of Alton v. Alton Water Co., 25 Ill.2d 112, 115 (1962), the Court said that the "question in each case is whether additional hearings or evidence are necessary to enable the Commission to comply with the rulings of this court[.]" 25 Ill.2d at 115. The Court's opinion in this case held that the Commission has the authority to impose an investment requirement, but that the "specific dollar amounts actually imposed" were not supported by the record. 352 Ill.App.3d at 642. The Court did not hold that no investment requirement was permitted but instead repeatedly described the deficiency in the Commission's Order as a failure to cite evidence to support the "specific dollar amount" or the "specific capital spending requirement," or "the \$600 million per-year capital spending requirement." It said that it would "expect evidence justifying" a multibillion dollar spending obligation. Id. Clearly, the Court's opinion authorizes the Commission to issue a new order affirming its decision to impose a capital spending requirement, provided the Commission identifies the particular evidence justifying the specific amount ordered.

The Commission has substantial discretion on remand to modify its orders based on the existing record or to reopen the record for additional evidence. Staff recognized that the scope of the Commission's authority on remand allows it to "accept additional evidence, reevaluate the evidence already presented, or simply reverse its original

determination[.]” Staff Initial Br. at 7, *quoting* Hartigan v. Illinois Commerce Commission, 117 Ill.2d 120, 142-143 (1987). GCI agree that the Commission can accept additional evidence or reevaluate existing evidence in order to comply with the ruling of the Appellate Court, provided the Commission’s actions are consistent with the holding of the Court. For example, considering evidence to justify an investment amount is consistent with the Court’s statements that the Commission has the authority to impose an investment requirement and that it expects evidence to support a specific dollar amount. If the Court had found that the Commission lacked authority to impose an investment requirement, however, it would be inconsistent to consider such evidence.

The Hartigan case, cited by both IBT and Staff<sup>1</sup> in their briefs on remand, confirms the scope of the Commission’s authority to reconsider existing evidence or take additional evidence when an order is remanded. Hartigan provides:

Under the Public Utilities Act, a court reviewing a Commission order has three options: the court may affirm the Commission’s order, it may reverse the order, or it may remand the cause to the Commission to receive new or additional evidence. The reviewing court does not have the power to direct the Commission to take specific action. If the evidence does not support the Commission’s order, the court is limited to setting aside the order as against the manifest weight of the evidence or remanding for additional evidence. **When the Commission’s order is set aside or remanded, the Commission may accept additional evidence, reevaluate the evidence already presented, or simply reverse its original determination.** A revised rate order may then again be subject to judicial review to ascertain whether the Commission’s new conclusions are supported by sufficient evidence.”

117 Ill.2d at 142-143 (bold added) (internal citations omitted). The Hartigan holding is the bedrock of appellate law in this area, and clearly states that the Commission has the power to determine the evidence it needs to comply with its statutory rate-setting obligations. It is also fully consistent with basic administrative law. See Am. Jur. 2d,

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<sup>1</sup> See IBT Initial Brief on Remand at page 7, footnote 1; Staff Initial Brief at 5-7.

Administrative Law, § 576 (2004) (“When a reviewing court has determined that there was reversible error in an administrative decision and the cause is remanded without restrictions to the administrative body, that tribunal is vested with discretion to decide whether to conduct a reconsideration merely or a full rehearing.”)

The ALJ Ruling incorrectly suggests that Hartigan must be read to preclude the Commission from ever evaluating existing evidence on remand or taking new evidence unless the Court specifically so directs the Commission. According to the ALJ Ruling, the Commission is very limited in what it can do on remand. In this case, it suggests that the only way to satisfy the mandate of the Court is to simply excise the investment requirement outright. The ALJ Ruling would unnecessarily and improperly limit the Commission’s discretion on remand in this case, and potentially in other cases which are remanded with instructions to enter an order “consistent with” the court’s opinion. The effort in the ALJ Ruling to parse the language of Hartigan to limit the options available to the Commission on remand should be rejected as unjustified by the text and as inconsistent with the basic structure of administrative law. See ALJ Ruling at 22-24; Am. Jur.2d, Administrative Law, § 576.

The ALJ Ruling would deprive the Commission of even the opportunity to consider whether a capital spending requirement is necessary for IBT’s plan to comply with section 13-506.1 by reading more restrictions into the Court’s opinion than exist. A reviewing court is not a finder of fact, and cannot direct the Commission to reach a specified factual result on remand or preclude further inquiry. In Citizens Utility Board v. Illinois Commerce Commission (Centel), 276 Ill.App.3d 730 (1<sup>st</sup> Dist. 1995) the court said: “Setting utility rates is a legislative rather than a judicial function. In the

ratemaking scheme, the Commission and not the court is the fact-finding body. ... This court lacks authority to delve into the record and make a finding of fact in order to support a ruling of the Commission.” 276 Ill.App.3d at 734-735 (internal quotes and citations omitted).

The principle that the Commission, not the court, must resolve questions of fact is well established. Only the Commission has the discretion to change an Order on remand. In N-Ren Corp. v. Illinois Commerce Commission, 98 Ill. App. 3d 1076, 1082 (Ill. 1981), citing Bhd. of R.R. Trainmen v. Elgin, Joliet & E. Ry. Co., 374 Ill. 60 (Ill. 1940), the Court stated that the reviewing court could not rewrite sections of an order, but only examines the Commission’s order as an “integrated entity.” When various parts of an Order are interdependent, the Commission, not the reviewing court, determines how to incorporate the court’s decision in a final order. Id.

This interdependency is well illustrated in the Commission’s Order in this docket, where the many factors and concerns found in section 13-506.1 were extensively discussed, both independently and as they related to IBT’s investment in the network. See also, e.g., Business and Professional People for the Public Interest v. Illinois Commerce Commission, 146 Ill.2d 175, 196 (1991) (“In the ratemaking scheme, the Commission and not the court is the fact-finding body.”); Illinois Bell Telephone Co. v. Illinois Commerce Commission, 283 Ill.App.3d 188, 210 (1996) (the court’s role is “to determine what the Commission was required to do but not how the Commission was to do it.”). On remand, the Commission must review the factual deficiency identified by the Court. Only the Commission has the power to determine whether the existing record

supports the investment requirement and can cure the deficiency identified by the Court, or whether new evidence must be taken.

Although GCI agrees, in principle, with the ALJ's proposition that the Commission's power on remand is limited by the language of the Court remand order, the ALJ Ruling does not recognize the difference between the scope of an appellate court's review and the Commission's authority. In this case, the Court differentiated between the lack of evidence on the amount of the investment requirement and the Commission's undisputed authority to impose the investment requirement. See 352 Ill.App.3d at 641-642. The Commission's authority to impose the requirement and the need to impose the requirement were affirmed, leaving only the amount of the investment requirement for further findings. On remand, the Court simply said:

“We also reverse the Commission's decision to include a \$600 million per-year capital spending obligation in the modified Alt Reg Plan. In all other respects, we affirm the Commission's order. This cause is remanded to the Commission with directions to enter an order consistent with this opinion. [¶] Affirmed in part and reversed in part; cause remanded with directions.”

Slip op. at 19; 352 Ill.App.3d at 642. The ALJ's recommendation that the Commission cannot reconsider the spending obligation distorts the Court's order by suggesting that it unequivocally reversed the spending requirement with no opportunity on remand to revisit the issue. This inaccurately reads the Court's opinion and ignores the Court's statement that it expects that there would be evidence justifying the amount *if* the Commission is to impose an investment requirement. Given the Commission's original conclusion that an investment requirement advances the goals of section 13-506.1, an order on remand consistent with the Court's order would of necessity include evidence specifically justifying the amount of the investment requirement.

Clearly a court may give specific directions, such as to consider particular evidence on remand. However, in this case, the Court declined to include specific instructions or to limit the Commission on remand. It simply said that the case was remanded for an order consistent with its opinion. The Commission has the full discretion allowed under section 10-201(e)(vi) of the Public Utilities Act, 220 ILCS 5/10-201(e)(vi), and the Hartigan case to reconsider the size of the spending obligation by reviewing the evidence concerning the investment requirement or taking additional evidence. This result conforms to the premise that: "In the ratemaking scheme, the Commission and not the court is the fact-finding body." Business and Professional People for the Public Interest v. Illinois Commerce Commission, 146 Ill.2d at 196 (1991).

In cases where the court specifies the procedure on remand, the Commission's discretion is limited. See 220 ILCS 5/13-201(e)(v)(court may reverse or remand in whole or in part and may state questions on remand or provide "such other instructions as may be proper" on remand); Illinois Bell Telephone Co. v. Illinois Commerce Commission, 283 Ill.App.3d 188, 210-211 (2d Dist. 1996)(directions on remand to determine specific factors in connection with section 9-230 analysis)(IBT Initial Br. at 6); Illinois Bell Telephone Co. v. Illinois Commerce Commission, 203 Ill.App.3d 443 (2d Dist. 1990)(directions on remand to take additional evidence on the allocation of common overhead costs)(IBT Initial Br. at 7). However, the remand order *in this case* was more general, providing remand for an order "consistent with this opinion." This remand is limited only by the holding of the Appellate Court that the Commission has the authority to impose an investment requirement, that there was evidence justifying the need for an investment requirement, and that the Order did not cite sufficient evidence to support the

*amount* of the investment requirement. Whether the investment requirement should be reset and in what amount are matters that are within the Commission's expertise and statutory charge.

As discussed in more detail below at pages 14-19, the lack of evidence and discussion of the *amount* of the investment requirement should not be surprising given that IBT did not contest the \$600 million per year investment figure in its pre-filed testimony, in cross-examination or in its briefs. If the Commission were precluded from considering the evidence now that IBT has reversed course and objects to continuing the amount of the requirement, IBT would be rewarded for allowing an issue to appear uncontested at trial, thereby limiting the evidentiary record on it, and then later arguing that there was insufficient evidence to support a position it had apparently accepted.

**III. THE ALJ'S ARGUMENTS AGAINST RETAINING THE \$600 MILLION ANNUAL INVESTMENT REQUIREMENT ARE CONTRARY TO EVIDENCE OF IBT'S ACCEPTANCE OF THE \$600 MILLION INVESTMENT REQUIREMENT AND OTHER RELEVANT EVIDENCE IN THE RECORD.**

In considering the Court's opinion and the scope of remand, the Commission should bear in mind that IBT did not oppose the amount of the capital spending requirement until its Application for Rehearing, filed close to five years after the case was opened. In its direct testimony, IBT witness Theresa Larkin, whose testimony was later adopted by IBT witness Thomas O'Brien, argued that a specific investment requirement was unnecessary because, in its Merger Order, "the Commission already specified the manner in which this commitment should be carried forward under alternative regulation." IBT Ex. 3.0 at 19. IBT went on to note that the real issue with



respect to the \$3 billion investment was whether the Commission would include the investment made by a subsidiary, Ameritech Advanced Data Services ("AADS"), in determining IBT's compliance with the \$3 billion commitment. Id.

Adoption of the ALJ Ruling that the language in the final Order addressing the \$3 billion investment obligation should be simply stricken would essentially reward the Company for sandbagging the Commission and the parties on this issue. The company cannot, and should not, be allowed, on the one hand, to testify that it has no objection to the inclusion of a \$3 billion investment obligation in any modified alternative regulation plan during the evidentiary phase of the proceeding and then, on the other hand, claim on remand that Staff and Intervenors were somehow remiss in failing to supply evidence to support that figure. In revising an order on remand, the Commission can certainly make it clear that the Company's stated position on the topic was that it had no objection to a continuation of the \$3 billion investment obligation in any modified alternative regulatory plan approved in this docket.

As referenced in GCI's Initial Brief on Remand, the Company retained in the entirety the \$3 billion investment in its original proposal in this docket, as shown in IBT's Exhibit 3.0, Schedule 1 (attached to Ms. Larkin's Direct testimony), which detailed the Company's proposed changes to the alternative regulation plan:

**D. Infrastructure Development**

Upon approval of the plan by the Illinois Commerce Commission, Illinois Bell will commit to at least \$3 billion in expenditures in Illinois for growth and modernization of the telecommunications network over the first five year period of the plan.

IBT Ex. 3.0, Schedule 1 (Larkin) at 7.

Company witness Thomas O'Brien, who adopted Ms. Larkin's testimony, could not have been clearer during cross-examination that the Company did not oppose extending the \$3 billion investment in the new, modified alternative regulatory plan:

BY MR. GOLDENBERG.

Q. Now, with respect to the infrastructure commitment that was continued from the merger order and we're reviewing in this particular docket. Is it Ameritech Illinois' position that the infrastructure commitment continue?

A. Yes.

Q. **So you are not in any way challenging the dollar amount, you are just looking for clarification with respect to what applies toward that dollar amount?**

A. What are you referring to?

Q. Your Exhibit 30 Page 19.

A. It's on Page 20 of mine.

Q. Did the pages change of that particular testimony?

A. Are you looking at Ms. Larkin's testimony?

Q. I was under the impression the pages –

MS. SUNDERLAND: Because we had to substitute a different CV, the pagination would have changed. We circulated the substitute copies to all parties.

JUDGE CASEY: It is on Page 19 of Ms. Larkin.

BY MR. GOLDENBERG:

Q. Referring to the paragraph that starts out: It is no longer – therefore, it is no longer necessary for the Alt-reg to contain a separate infrastructure commitment.

It sort of sounds like you are saying there that there shouldn't be a commitment in this order?

A. I believe what the Company's position is we have agreed to accept the merger order, it being the infrastructure commitment that could be part of the Alt-reg order.

Q. You understand my cause for concern. That piece of testimony seems to clearly say you are not looking for that. You didn't feel it was necessary to be in this order. Are you changing that and saying you are in agreement that it should be part of this order?

A. Well, again, I think the merger order specified the order in which the commitment should be carried forward under alternative regulation.

I think what it does is says as long as there is alternative regular (sic) continue the 3 billion commitment ought to be part of the Alt-regulation order.

**Maybe I wasn't real clear on this, but we believe the Commission has already spoken to that and said as part of Alt-reg, you ought to have that same 3 billion commitment.**

Q. So you are not seeking to modify that in any way?

A. No, we are not.

Tr. 714-717 (bold added). This transcript passage makes clear that Illinois Bell did not challenge the inclusion of a specific \$3 billion/5 year investment in any new, modified alternative regulatory order. On the contrary, IBT adopted its renewal and inclusion in *its* proposed plan.

At yet another juncture in cross-examination, Mr. O'Brien once again clarified that the Company had no objection to extending the \$3 billion investment in any new alternative regulatory plan approved in this docket:

BY MR. MANSHIO:

Q. You're aware of the Commission's extension of the infrastructure commitment on Ameritech as part of the merger order?

A. Yes, I am.

Q. Does the company plan to change that commitment in this docket?

A. No, it doesn't.

Tr. 620.

Likewise, Staff witness Judith Marshall also testified she understood the \$3 billion investment requirement was an "*agreed upon commitment*" that should be

continued under any alternative regulation plan adopted or modified in this docket. ICC Ex. 4.0 at 13; ICC Ex. 18.0 at 12. Again, the evidentiary debate that ensued with respect to infrastructure investment was not the size of the investment but whether IBT affiliate ADDS investment should be included within the \$3 billion figure. On that point, Ms. Marshall testified that Ameritech affiliate expenditures should not be considered to satisfy, again, what she called "*this agreed upon commitment.*" ICC Ex. 18.0 at 12-13 (emphasis added).

The Commission is free to consider evidence currently in the record or to reopen the record to take additional evidence relevant to the issues outstanding on remand, i.e., the amount of the investment commitment, to insure that the Alt Reg Plan continues to serve the purposes of section 13-506.1. Under the City of Alton standard, 115, 182 N.E. 2d 665, 667 (1962); accord City of Chicago v. Ill. Commerce Comm'n, 4 Ill. 2d 554, 123 N.E. 2d 500 (1954), the Commission may find that no additional hearings are necessary to both comply with the Court's order and uphold the \$3 billion investment requirement. The Commission may gather the evidence summarized in this Petition and GCI's Initial and Reply Briefs on Remand. Among the relevant evidence are:

- (1) IBT's acquiescence to the \$3 billion investment in the renewed alternative regulation plan;
- (2) Staff witness Marshall's support for the continuation of the \$3 billion commitment;
- (3) IBT's historical and budgeted investment figures, which show that that IBT had invested \$3.7 billion over the five years of the plan. IBT Ex. 1.1 at 54. The Commission's December 30, 2002 Order documented the Company's annual investment spending levels for the 1999-2001 (budgeted) time period. Capital investments in Illinois were as follows: \$787 million in 1999, \$918 million in 2000 and \$1.043 billion (estimated budget) in 2001. (Order at 205). A citation to these figures, combined with more recent figures which show a disturbing decrease in investment in 2003 (see Exhibit A to this Petition), justifies a

requirement that the Company, at a minimum, maintain telephone plant investment at a similar level for the foreseeable future; and

(4) IBT reported its annual depreciation expense as \$600 million, on average. The depreciation expense represents the diminution of value of existing plant and is included in rates to provide funds to replace worn out plant. This equals the amount of the annual investment requirement. See, e.g. IBT Ex. 1.1 at 54; City of Chicago Ex. 1.0 at 38; GCI Brief on Remand at 15-16.

These are examples of evidence in the record that addresses the amount of the investment requirement, although it was not expressly discussed by the Commission in the section of its Order adopting the investment requirement. This is the kind of evidence that the Commission should reconsider in determining whether to retain the \$600 million investment requirement or open the record to additional evidence.

**IV. THE ALJ'S REASONS AGAINST EXTENDING THE INVESTMENT REQUIREMENT ARE FACTUAL IN NATURE, NOT SUPPORTED BY RECORD EVIDENCE, AND IGNORE THE COMMISSION'S CONCLUSION THAT CONTINUING AN INVESTMENT OBLIGATION WAS NECESSARY TO SATISFY THE PUBLIC INTEREST AND SECTION 13-506.1 OF THE ACT.**

In support of striking the \$600 million annual investment obligation, the ALJ asserts that "the now-reversed spending requirement evolved in response to the service quality history for SBCI that loomed large on the record developed in 2001." ALJ Ruling at 26. She advises the Commission that it "is compelled to acknowledge that this record is well beyond stale and that many other factors have moved out into the forefront." Id. She also notes that the Commission's final order was replete with service quality penalties that have served as "strong incentives for maintaining service quality". Id. The ALJ Ruling ignores the Commission's stated reasons for continuing the investment requirement in the Alt Reg Plan.

As noted in GCI's Initial Brief on Remand, the December 30, 2002 Order involves an alternative regulatory plan that reflects the many interdependent factors and concerns found in Section 13-506.1. GCI Initial Brief on Remand at 10-12.<sup>2</sup> The Commission, on remand, must consider the role of the investment requirement in the Alt Reg Plan as a whole. In its December 30, 2002 Order, the Commission considered all of the requirements and goals of alternative regulation when it extended the investment requirement, and expressly found that investment was necessary for the plan to satisfy the public interest. Order of December 30, 2002, at pages 192—193, as amended on

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<sup>2</sup> The Order's many references to IBT's network investment demonstrate what a critical component of the plan investment is. The Commission discussed IBT's investment in the following sections of the Order:

**II. Ten Point Review – Commission Specific Issues:**

(c) **Whether the adopted monitoring and reporting requirements should be retained or adjusted.** Page 14-17

(d) **The extent to which Illinois Bell has modernized its network and additional modernization plans for the near term.** Page 17-20

**III. The Statutory Criteria and Goals:**

**B. Did the Plan Respond to Changes in Technology And The Structure Of The Telecommunications Industry That Are, In Fact Occurring.** Authority: Section 13-506.1(b)(3) and Alt Reg. Order. Page 43-45

**C. Does the Plan Continue to Constitute A More Appropriate Form Of Regulation Based On The Commission's Overall Consideration of Section 13-506.1 (a), and the Section 13-103 Policy Goals.**

**Premise No. 2 - The Alternative Form of Regulation Encourages Innovation in Telecommunications Services.** Authority: Section 13-506.1(a)(2) and Alt Reg. Order at 181. Page 47-49.

**Premise No. 4 – The Alternative Form of Regulation Facilitates The Broad Dissemination of Technical Improvements To All Classes of Ratepayers.** Authority: Section 13-506.1 (a) (4); the Alt Reg Order at 182. Page 50-52.

**Premise No. 5 - The Alternative Regulation Plan Enhances the Economic Development of the State.** The Development of and Prudent Investment in Advanced Telecommunications Networks That Foster Economic Development Of the State Should Be Encouraged. (Section 13-103(f)). Authority: Section 13-506.1 (a)(5); Section 13-103 (f); Alt Reg Order at 183. Page 53-54.

**F. Has the Plan maintained the Quality and Availability of Telecommunications Services.** Authority; Sections 13- 506.1(b)(6); 13-103(c) and Alt Reg Order. Page 62 – 73, 70.

**G. Is the Plan in The Public Interest.** Authority: Sections 13.506.1(b)(1); 13.506.1(b)(4) and Alt Reg Order. Page 73-77, 76.

**VII. Service Quality – Going Forward G. Other Service Quality Issues, 2. Investment.** Page 191-192

**VIII. Overview and Final Plan Modifications,** Page 195-198.

February 14, 2003. Neither the Court nor the Commission can simply sever the investment requirement from the Order without undermining the Commission's conclusion that continuation of the investment was necessary for the plan to be in the public interest. See N-Ren Corporation v. Illinois Commerce Commission, 98 Ill.App.3d 1076, 1083 (2d Dist. 1981)(Commission must review unity of Order on remand in incorporating court's holding).

The ALJ also incorrectly asserts that the investment requirement "was not based on a proposal by any of the parties but on the Commission's view of some means by which to address historical service failures." ALJ Ruling at 27. Nowhere in the Commission's Order does it state that the investment obligation was included for service quality reasons alone. On the contrary, as noted above, the Commission clearly stated that the investment obligation was a means to ensure that technical improvements were disseminated to all classes of IBT customers, to encourage innovation, and was necessary to satisfy the requirements and public policy goals of Section 13.506.1 of the Act. See Order of December 30, 2002, at page 192—193, as amended on February 14, 2003, quoted above at pages 3-4 and footnote 3. The Commission's inclusion of stiffer service quality penalties and customer remedies in the Order specifically addressed service quality problems. As the language of the Order demonstrates, the investment obligation was imposed to address different statutory concerns.

Further, notwithstanding the ALJ's comments that the circumstances surrounding the investment requirement have changed (ALJ Ruling at 26-27), the Commission can only consider evidence currently in the record, or open the record to take additional

evidence. See 220 ILCS 5/10-103.<sup>3</sup> The ALJ's argument that the Order cannot be revised to justify the \$3 billion investment figure is based on her view of changed circumstances – a view not supported by any record evidence. The ALJ's conclusion that the Commission's well-founded investment requirement must be eliminated does not comport with the law and should be disregarded. See 220 ILCS 5/10-103 (orders "shall be based exclusively on the record for decision in the case...").

The ALJ Ruling relies on factual assertions that are best left for evidentiary hearings on Remand, should the Commission determine such hearings are necessary. The ALJ's conclusion that the Commission should not reconsider or modify the existing Order or hold hearings on the investment obligation because of perceived IBT service quality improvements ignores the fact that the alternative regulation law authorizes an investment requirement, and that the Court recognized that the Commission adopted the requirement for reasons other than service quality. The Commission should not blind itself to these other considerations by limiting its attention to service quality and abandoning the statutory foundation of the investment requirement.

## **VI. CONCLUSION**

The ALJ Ruling would unreasonably and unnecessarily restrict the Commission's discretion on remand and should be rejected by the Commission. For all of the reasons stated above and in GCI's Initial Brief on Remand, Governmental and Consumer Intervenor respectfully request that the Commission enter an Order on Remand

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<sup>3</sup> Section 10-103 provides in relevant part: "In all proceedings, investigations or hearings conducted by the Commission, except in the disposition of matters which the Commission is authorized to entertain or dispose of on an ex parte basis, any finding, decision or order made by the Commission shall be based exclusively on the record for decision in the case, which shall include only the transcript of testimony and



identifying the record evidence that supports the continuation of the \$3 billion investment requirement and upholding the obligation; or in the alternative, request that the Commission take additional evidence and conduct hearings to determine a new, specific dollar investment requirement of the Company.

Respectfully submitted,

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March 16, 2005

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exhibits together with all papers and requests filed in the proceeding..."

**STATE OF ILLINOIS  
ILLINOIS COMMERCE COMMISSION**


|                                       |   |         |
|---------------------------------------|---|---------|
| Illinois Bell Telephone Company       | ) |         |
|                                       | ) | 98-0252 |
| Application for review of alternative | ) |         |
| regulation plan.                      | ) |         |
|                                       | ) |         |
| Illinois Bell Telephone Company       | ) |         |
|                                       | ) | 98-0335 |
| Petition to rebalance Illinois Bell   | ) |         |
| Telephone Company's Carrier Access    | ) |         |
| and Network Access Line Rates         | ) |         |
|                                       | ) |         |
| Citizens Utility Board and            | ) | (cons.) |
| The People of the State of Illinois   | ) |         |
| vs.                                   | ) |         |
| Illinois Bell Telephone Company       | ) |         |
|                                       | ) | 00-0764 |
| Verified Complaint for a Reduction in | ) |         |
| Illinois Bell                         | ) |         |
| Telephone Company's Rates             | ) |         |
| and Other Relief.                     | ) |         |

**NOTICE OF FILING**

TO: (see attached service list)


Please take note that on March 16, 2005, we submitted the Government and Consumer Intervenor's Petition for Interlocutory Review of the ALJ'S February 23, 2005 Ruling in the above-captioned matter to the Chief Clerk of the Illinois Commerce Commission for filing by sending them to 527 E. Capitol Avenue, Springfield, Illinois 62701 by United Parcel Service courier, prepaid, on March 16, 2005.

Dated: March 16, 2005

  
Susan L. Satter  
Senior Assistant Attorney General

CERTIFICATE OF SERVICE

I, Susan L. Satter, certify that the foregoing documents, together with a Notice of Filing, were sent to all parties of record listed on the attached service list by email or regular mail with postage prepaid on March 16, 2005.

A handwritten signature in cursive script, reading "Susan Satter", written in black ink.

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VERIFICATION

STATE OF ILLINOIS   )  
                                  ) SS  
COUNTY OF COOK    )

Susan L. Satter, states that she is a Senior Assistant Attorney General; that she has read the foregoing Government and Consumer Intervenors' Petition for Interlocutory Review of the ALJ'S February 23, 2005 Ruling in ICC Docket No. 98-0252, 98-0335 and 00-0764 (cons); that she knows the contents thereof; and that to the best of her knowledge, information and belief, based upon reasonably inquiry, the contents are true and correct.



Susan L. Satter  
Sr. Assistant Attorney General  
Public Utilities Bureau

Signed and sworn to before me  
this 16<sup>th</sup> day of March, 2005.



Notary Public

